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# In the Supreme Court of the United States

OCTOBER TERM, 1970

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**DONALD J. VAN RIPER, JR.,**
*Petitioner,*

vs.

**PEOPLE OF THE STATE OF ILLINOIS,**
*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT (Elgin, Illinois)

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**PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT (Elgin, Illinois)**

---

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioner, Donald J. Van Riper, prays that a Writ of Certiorari be issued to review the decision of the Appellate Court of Illinois, Second District in affirming his conviction as an aider and abettor in the sale of a small

quantity of marijuana for $25 for which conviction he was sentenced to a term of 10 years to 10 years and a day in the Illinois State Penitentiary.

## Opinion Below

The opinion of the Appellate Court of Illinois, First District is reported at 127 Ill.App.2d 394, 262 N.E.2d 141 (1970) and is reprinted in this petition as Appendix "A." Opinion on denial of petition for rehearing appears as Appendix "B".

A timely Petition for Leave to Appeal to the Supreme Court of Illinois was denied without opinion on January 26, 1971.

## Jurisdiction of this Court

1. The jurisdiction of this court is invoked under Title 28 U.S. Code, Sec. 1257(3) and Rule 22(1) of the rules of this court.

## Questions Presented for Review

1. Is the Illinois classification of marijuana as a narcotic arbitrary, unscientific, false and, therefore, an unconstitutional designation; and accordingly, is the penalty feature of the Illinois statute (Chap. 38, Sec. 22-40(3) Ill. Rev. Stat. 1969) unconstitutional as violative of the due process clause of the 14th Amendment to the Constitution of the United States?

2. Is the court's failure to instruct on the essential element of the crime violative of petitioner's right to a fair trial in accordance with due process of law?

3. Was petitioner's conviction as an aider and abettor in the commission by another of a sale of a small quantity of marijuana proper where the State introduced evidence of other crimes committed by the principal, who was not on trial?

4. Was petitioner deprived of a meaningful post-trial sentencing hearing in mitigation, in violation of his constitutional rights under the equal protection clause?

## Statement of the Case

The petitioner was present in the apartment of one George Haynes on December 17, 1968 in Aurora (Kane County), Illinois when Haynes negotiated with an agent of the Illinois Bureau of Narcotics for the purchase of some marijuana. Haynes and the agents haggled over the price. Haynes and petitioner left in petitioner's car and returned a short time later. The agents questioned whether it was good material and petitioner stated that if they did not buy the marijuana, he would — even if he had to go out and get the money. Petitioner also stated it was good material (Abst. 29).[1] Petitioner smoked an alleged marijuana cigarette in the agent's presence in connection with this alleged conversation:

> "[Petitioner] was not shown to be in possession of the marijuana and he was not seen by the agents to have received any of the money paid to Haynes in the purchase." (262 N.E.2d 143; Op. App. A., p. 2).

Petitioner denied he was present in the apartment at all on that day; and in this he "was corroborated by his sister and brother and two employees of a shopping center where he claimed to be during the time in question" (Op., App. A. p. 2; 262 N.E.2d 143).

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[1] "Abst." refers printed Abstract of Record as filed in the reviewing court.

## Reasons for Granting the Writ

### 1.

**The Illinois classification of marijuana as a narcotic is arbitrary, unscientific and false and therefore the penalty feature of the Statute (Chap. 38, Sec. 22-40(3), Ill. Rev. Stat. 1969) is unconstitutional as violative of the Due Process Clause of the 14th Amendment to the Constitution of the United States.**

The Illinois statute with respect to the penalty provides:

> "Whoever violates this act by . . . selling . . . any narcotic drug, shall, for the first offense be imprisoned in the penitentiary for any term from 10 years to life . . . No probation or suspension of sentence may be granted to any violator convicted under this paragraph of this section." Chap. 38, Sec. 22-40(3), Ill. Rev. Stat. 1969).

Illinois classifies marijuana as one of the "narcotic drugs" which include heroin, cocaine, opium and morphine. (Chap. 38, Sec. 22-2(17), I.R.S. 1969).

Illinois also prohibits the sale of certain other drugs such as "depressant or stimulant drugs which includes amphitimes, "speed", "LSD", barbituates and others designated by the Attorney General of the United States or the Superintendent of Narcotic Control "as having potential for abuse because of the depressant or stimulant effect on the central nervous system or its hallucinogenic effect." (Chap. 111½, Sec. 801, I.R.S. 1969). For those who make an unlawful sale of a "depressant or stimulant" drug the penalty is a misdemeanor with a maximum penalty of one year imprisonment and with probation permitted. (Chap. 111½, Sec. 804).

All scientific and medical authorities are in agreement that marijuana is not a narcotic drug, is not addictive, is a mild hallucinogen or intoxicant and cannot be classified with narcotic drugs such as heroin, and is even far less dangerous than the so-called depressant or stimulant drugs such as amphetamines, barbiturates, "LSD" (lysergic acid diethylomide) or "speed" (methamphetamine).

Accordingly, the gross disparity in the Illinois sentencing provision for those possessing or selling marijuana as against those possessing or selling other depressant or stimulant drugs is unconstitutional in violation of Article II, Section 11 of the Illinois Constitution which provides in part:

> "All penalties shall be proportioned to the nature of the offense . . . ",

the Eighth Amendment to the United States Constitution, which provides, in pertinent part:

> " . . . nor [shall] cruel and unusual punishments [be] inflicted."

and the Fourteenth Amendment to the Constitution of the United States which prohibits the states from depriving a person of liberty "without due process of law." The gross disparity in the treatment of marijuana law violators amounts to an unscientific classification in violation of the equal protection clause of the Fourteenth Amendment. See Kaplan, John, "Marijuana — The New Prohibition" (New York: The World Publishing Company, 1970) pp. 364 et seq.

The following authorities hold that marijuana is not a narcotic and is more to be classified with mild stimulant drugs:

> Grinspoon, Lester Dr., "Marijuana Reconsidered" (Cambridge, Mass.: Harvard University Press, 1971) p. 235.

"Resource Book For Drug Abuse Education" United States Department of Health, Education and Welfare (1969), 25, 26, 29-30.

"Fact Sheets," Bureau of Narcotics and Dangerous Drugs, United States Department of Justice (1969), 6-1-2, 7-2, 8-1, 9-2, 10-1-2.

Statement of Attorney General John M. Mitchell, before the Subcommittee to Investigate Juvenile Delinquency of the United States Senate Committee on the Judiciary (1969), 212.

Statement of Dr. Stanley F. Yolles, prepared for presentation before the Subcommittee To Investigate Juvenile Delinquency of the United States Senate Committee on the Judiciary (1969), 23-27.

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Report of the President's Commission On Law Enforcement and Administration of Justice ['The Challenge of Crime In a Free Society'] (1967), 223-225.

Final Report of the National Commission On the Causes and Prevention of Violence (1969), 235-238.

Interim Report of the Commission of Inquiry into the Non-Medical Use of Drugs, published by Canadian Ministry of Health (1970) pp. 71-99.

A statutory classification not based upon some difference reasonably related to the purpose of the statute is constitutionally invalid.

*Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 560-561 (1902).

*McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964).

The cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution is applicable to the states. *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 463 (1937); *Robinson* v. *California*, 370 U.S. 660, 666 (1962).

A penalty which is excessive in view of the gravity of defendant's conduct violates the cruel and unusual punishment clause. *Weems* v. *United States*, 217 U.S. 349, 364-365, 377-378, 380-381 (1910); *Chicago & A. R. R. Co.* v. *People*, 67 Ill. 11, 26-27 (1873).

The Supreme Court of Washington has last year held unconstitutional the very classification here involved, in *State* v. *Zornes*, 469 P.2d 552 (Wash. 1970). Holding that an amendment to the state's drug laws reclassifying marijuana from "hard drugs" to drugs of lesser danger should be given retroactive effect, the Court recognized the grave constitutional problems which would arise if the prior classifications remained in effect. After reviewing many of the scientific treatises on the distinctions between the

effects of marijuana and "hard drugs" (469 P.2d at 558-559), the court said (469 P.2d at 559-560):

> *"The consensus is that cannabis is not a narcotic but rather is a mild hallucinogenic and that it has a stimulating and depressant effect on the central nervous system. Thus it is a drug of the type included within the dangerous drug act.*
>
> "In its 1969 amendments * * * to the narcotic drug act and the dangerous drug act, the legislature tacitly acknowledged that cannabis has always belonged in the dangerous drug act and not in the narcotic drug act. It evidently took cognizance of what is now generally known about cannabis — that its use does not lead to addiction, that is, its use can be discontinued without withdrawal symptoms, such as are suffered by opium addicts and alcoholics. The human body does not develop a tolerance to it, as it does to opium and alcohol. Some individuals may become emotionally dependent upon it, and it may indeed have no beneficial effects, but its use does not, in itself, create problems of addiction.
>
> * * *
>
> "The fact that the legislature did, in another act, define it as a 'narcotic drug' did not change its nature and give it properties which it does not possess.
>
> * * *
>
> " . . . *It is doubtful whether a legislative declaration contrary to all the evidence can be sustained as constitutional, if its effect is to deny to a defendant equal treatment under the law.* [Citing authorities, including the *Skinner* case, *supra.*] . . . " (Emphasis added.)

Certiorari should be granted to resolve a question applicable to every state and to thousands of prosecutions.

**2.**

**The court's failure to instruct the jury on the essential element of the crime, to-wit: the definition of marijuana, violated the petitioner's right to a fair trial in accordance with due process of law.**

*The statutory definition on December 17, 1968, the time when the offense was allegedly committed. Likewise, in May, 1969, when the case was tried.*

The statutory definition, Ch. 38, Sec. 22-2-17 (Ill. Rev. Stat. 1967) reads as follows:

> "Narcotic drugs means any of the following: (3) 'Cannabis' includes all parts of the plant Cannabis Sativa L. (commonly known as marijuana), whether growing or not; the seeds thereof, the resin extracted from any part of such plant; and every compound manufactured salt, derivative mixture or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber oil or cake, or the sterilized seed of such plant which is incapable of germination."

The trial court failed to define for the jury at all the definition of Cannabis as set out in the statute, and the failure so to instruct on the *essential* element of the important issue in the case is so fundamental as to require reversal, even though not objected to by defense counsel. *Screws* v. *United States,* 325 U.S. 91 at 107:

> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial."

All that the court instructed here is that, "A person commits the crime of violating the narcotic drug act who sells marijuana." (R. C-57).[2]

And further, the court instructed, "To sustain the charge of violating the narcotic drug act, the State must prove the following proposition: that between the hours of 6:30 P.M. and 8:30 P.M. on Tuesday, December 17, A.D. 1968, the defendant, Donald J. Van Riper, Jr. was knowingly guilty of conduct which aided and abetted George Haynes in the sale of marijuana." (R. C-59).

*There is nowhere any instruction to the jury defining marijuana or Cannabis,* and the Appellate Court so noted. (262 N.E.2d at 145; Op. App. "A", p. 8) Absent this instruction the jury could not determine whether the State's expert witness found the substance in question to be marijuana in accordance with the statutory requirement. (Tr. 219-224).[3] Or whether it was oregano or tea, as the defendant said it looked like. (Tr. 319).

If the jury was left without guidance on this essential element of the crime, it could not properly determine whether what was allegedly sold for $25 to the agent by Haynes was or was not legally prohibited marijuana.

An identical situation occurred in *Shurman* v. *United States,* 219 F.2d 282 (5 Cir. 1955). The Fifth Circuit Court of Appeals reversed for, amongst other reasons, failure

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[2] "R." refers to Common Law Record as filed in the reviewing court.

[3] "Tr." refers to Transcript of Proceedings (of evidence) as filed in the reviewing court.

(as here) of the court to instruct on the definition of marijuana.[4]

The court stated, p. 292:

> "The definition of marihuana in the statute is complicated and confusing. The court declined to permit unqualified witnesses to testify that the seized articles contained marihuana, thus correctly indicating that such a determination was one in which the jury needed the assistance of expert opinion. Unquestionably, therefore, the court should have given to the jury a definition of marihuana even though the charge requested was, as to its second part, itself unclear. The chemist testified that he made both a chemical and microscopic test and found resin present. The fact that he also found present particles of the plant *cannabis sativa* that are excluded from the definition, did not prevent the jury from considering whether there was also present resin from the plant; for them to do this they needed an appropriate instruction from the court."

In the most recent case essentially in point in Illinois, the Appellate Court, First District,[5] reversed for precisely the argument here advanced. *People* v. *Lewis,* 112 Ill. App. 2d 1, 250 N.E. 2d 812 (1969). In *Lewis* also, the defendant was convicted of sale of marijuana. The only instruction there touching upon the point here involved was:

> "The Court instructs the jury in the language of the Statute that it is unlawful for any person to sell any narcotic drug, *except as authorized by the Illinois*

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[4] To be noted is that the federal statutory definition of marijuana, 26 U.S.C. 4761 was identical to the Illinois statutory definition. See 219 F.2d at 292, fn. 12.

[5] The First District of the Illinois Appellate Court embraces Cook County (Chicago). The Second District, to which certiorari, is sought embraces suburbs west of Chicago.

*Statute entitled 'The Uniform Narcotic Drug Act'."* (Emphasis, the Court's).

"We must determine, therefore, whether, in the above instructions, the jurors were adequately instructed as to the elements of the crime charged. And we find that they were not. Instruction (5) is the one which attempts to do this but fails in two particulars. First, it omits the element of the crime relating to defendant's mental state; it does not recognize that the offense of selling, etc., is not complete unless done knowingly. See Ill. Rev. Stat. (1963), ch. 38, Sec. 4-3, 4-5, 22-3; *People* v. *Bussie,* 41 Ill. 2d 323, 324, 243 N.E. 2d 196; and *People* v. *Bolden,* Ill. App. 243 N.E.2d 687, 689. The instruction is also bad because it leaves it up to the jury to decide what exceptions may be 'authorized by the Illinois Statute entitled the Uniform Narcotic Drug Act.' Aside from a lack of delineation of those exceptions, the confusion of the jury resulting from this instruction is compounded by the fact that defendant did not argue that he was excused by any statutory exception, and the evidence disclosed none.

"This instruction (5) was tendered by the State, was given by the court without objection by defendant, and no other instruction setting forth the elements of the crime was offered. We consider none of these facts to be relevant here, *since it was a fundamental responsibility of the court to see to it that the jury not be permitted to deliberate defendant's guilt or innocence of the crime charged without being told the essential characteristics of that crime. . . .* "

Thus it may be observed there is a conflict between two Divisions of the Illinois Appelalte Court.

In holding the *Lewis* and *Shurman* cases inapplicable, the reviewing court stated "the proof was clearly sufficient to sustain the guilty finding . . . " 232 N.E. 2d 146. But the argument advanced was failure to instruct on an essential issue — not sufficiency of evidence.

### 3.

**Petitioner's conviction as an aider and abettor was improper where the State presented evidence showing the principal committed other crimes of a like nature.**

Petitioner was tried alone on an indictment charging him with aiding and abetting one, Haynes, in the $25 sale of marijuana to undercover state agents. Over objections, the State was permitted to show that the agents had previous marijuana transactions with Haynes, but without any alleged participation by the petitioner.

The petitioner defended on an alibi — that he was not present in the apartment on December 17, 1968 when the alleged sale by Haynes took place.

> "Defendant was not shown to be in possession of the marijuana and he was not seen by the agents to receive any of the money paid to Haines in the purchase. *Van Riper testified that he was not present in the apartment on December* 17th. This was corroborated by his sister and brother and two employees of a shopping center where he claimed to be during the time in question." (Emphasis added) *People* v. *Van Riper*, 127 Ill.App.2d 394, 262 N.E.2d 141 at 143, and Op., App. A, p. 2.

Yet, in the face of that defense, the Appellate Court overuled this claimed error in its Supplemental Opinion on Petition for Rehearing and held admissible evidence of "defendant's *knowledge of the commission* of illicit sales by Haynes on previous occasions when no criminal activity of defendant was suggested, to meet defendant's theory that he was an innocent bystander at the time of this crime charged against him. We adhere to our opinion on this point." 262 N.E.2d at 146; Op. App. A, p. 9 (Italics, the court's).

Thus, it is clear the reviewing court used an impermissible standard in affirming, while acknowledging that error otherwise occurred. For defendant did not claim he was "an innocent bystander"; he claimed, he was not present at all, and presented strong evidence supportive of his alibi. Thus, reference to other crimes was reversible error. *Boyd* v. *United States,* 142 U.S. 450 (1891):

> "Proof of [other crimes] only tended to prejudice defendant with the jurors, to draw their minds away from the real issue, . . . However depraved in character and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence and only for the offense charged." 142 U.S. at 458.

Illinois has the same rule, *People* v. *Lewerenz,* 24 Ill.2d 296 (1962); but it was not applied in the case at bar, presumably because of the Appellate Court's misunderstanding of the defense. In *Lewerenz,* the Illinois Supreme Court held:

> "Within the rule [of exceptions] we have held that in prosecuting for a sale of narcotics on a specific date, the sale of narcotics on a prior date may not be shown to convict the accused of the crime charged." 24 Ill.2d at 298.

See also *United States* v. *Fierson,* 419 F.2d 1020, 1023 (7 Cir. 1969); *United States* v. *Menk,* 406 F.2d 124, 126 (7 Cir. 1968); *United States* v. *Rinaldi,* 301 F.2d 576 (2 Cir. 1962); *United States* v. *Brandenburg,* 155 F.2d 110 (3 Cir. 1946); and *Tobin* v. *United States,* 93 F.2d 861 (10 Cir. 1938).

When we consider the onus a mere charge of selling drugs has upon a jury, the stigmata on a defendant who is shown merely to be present on prior occasions when

the same agent purchased marijuana from other individuals is too great to overcome and cannot be minimized by the trial court's instructions to the jury that " . . . such evidence has been admitted for the limited purposes of attempting to show the knowledge or intent of the defendant on the occasion in question. You should not consider such evidence for any other purpose." (R. C-48).

But such cautionary instruction to disregard cannot cure the error. See *United States* v. *Rinaldi,* 301 F.2d 576 (2 Cir. 1962) and *Bruton* v. *United States,* 391 U.S. 123; (1968).

Uniquely enough, the same Appellate Court which in this case permitted evidence of other crimes on the theory that such attempted "to show the knowledge or intent of the defendant", reversed a conviction on that same ground — but after the original opinion was handed down in this case. Cf. *People* v. *Meid,* ..... Ill.App.2d ....., 264 N.E.2d 209 (1970) where the same court held, in reversing,

> "Further, the sale of a narcotic is not a specific intent crime, Section 3 of the Uniform Narcotic Drug Act, (Ill. Rev. Stat. 1967 Chap. 38, Sec. 22-3) and, therefore, intent was not an element which the State was required to prove."

Certiorari should be granted to extricate the petitioner from the morass of inconsistent judicial rulings, on the same point, and because the Illinois reviewing court has departed from long held decisions in this, and in other federal courts, to the effect that a defendant is prejudiced in the eyes of the jury when other offenses are shown against him.

**4.**

**Petitioner was deprived of a meaningful post-trial hearing in mitigation in violation of his constitutional rights under the equal protection clause.**

Section 1-7(g) of the Illinois Criminal Code, Chap. 38, I.R.S. 1969, provides:

> "For the purpose of determining sentence to be imposed, the court shall, after conviction, consider the evidence, if any, received upon the trial and shall also hear and receive evidence, if any, as to the moral character, life, family, occupation and criminal record of the offender and may consider such evidence in aggravation or mitigation of the offense."

Since the only appropriate sentence here would have been less than the statutory minimum,[6] the mitigation hearing held was in name and form only; it had no substance or meaning. The many mitigating factors set forth in the pre-sentence report clearly cry out for probation, or at the very most a sentence with a minimum term of no more than one year. The trial judge recognized the injustice of the sentence he imposed, but felt hamstrung by the command of Section 22-40(3) that he may not grant probation and that he must sentence defendant to at least 10 years in prison. He sentenced defendant to 10 years to 10 years and a day.

None of the purposes of a real post-trial pre-sentence hearing was served by this charade. Those purposes were set forth in *People* v. *Spann,* 20 Ill.2d 338, 342 (1960):

> " . . . the protection of the accused and society alike and . . . permitting intelligent judicial discretion in

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[6] Petitioner had no prior record; he was employed by a railroad; he helped support his mother, grandfather, and younger sister and brother; he was not the principal in the offense.

> the matter of imposing sentence, in derogation of the ancient belief that 'every offense in a like legal category calls for an identical punishment.' [*Williams* v. *New York*, 337 U.S. 241, 247 (1949)]."

The defendant's right to be heard in mitigation, before sentence is imposed, is a fundamental right which cannot be taken from him by the legislature any more than by the judiciary. It is ironic that the same Code which contains these heavy-handed sentences also provides in Section 1-2 that the Code is to be construed "in accordance with the general purposes hereof, to . . .

> "(c) Prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders:
>
> "(d) Prevent arbitrary or oppressive treatment of persons accused or convicted of offenses."

Despite these directives, defendant's right to adduce mitigating proof prior to being sentenced was, as a direct result of the gargantuan penalties mandated by Section 22-40(3), reduced to a form of words, utterly devoid of substance or meaning.

This denial of the right to a meaningful hearing in mitigation to a single class of defendants, without any rational basis for the classification, breached defendant's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This procedure violated defendant's rights under the principle of *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), since the meaningful mitigation hearing denied defendant is available to those convicted of unlawful sale of "depressant or stimulant drugs" which are similar to, or more harmful and dangerous than, marijuana. And since the mitigation hearing is fundamental under Illinois law as expounded in

Section 1-7(g) of the Illinois Criminal Code and in the *Spann* case, denial of a real hearing in mitigation violated the rights guaranteed to defendant by the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Article II, Section 2 of the Illinois Constitution.

## Conclusion

Legislative enactments contrary to scientific reality spawn disrespect amongst hundreds of thousands (if not millions) of the young in our society. This, of course, "not only weakens the confidence of a large number of our youth in our whole judicial system, but also aggravates greatly the hostility many young people feel for the police."[7]

Certiorari should be granted, as in *Leary* v. *United States,* 395 U.S. 6, to decide between legislative fiction and scientific fact — whether marijuana is, or is not, a narcotic.

Respectfully submitted,

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FREDERICK F. COHN
WILLIAM LASKO, II
*Attorneys for Petitioner*

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[7] Kaplan, John, "Marijuana — The New Prohibition" (Cleveland: The World Publishing Company, 1970), p. 44.

# APPENDIX

## APPENDIX A

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF STATE OF ILLINOIS,

*Plaintiff-Appellee,*

VS.

DONALD J. VAN RIPER, JR.,

*Defendant-Appellant.*

— No. 69-182 —

*Mr. Justice Seidenfeld Delivered The Opinion Of The Court:*

Defendant was convicted by a jury under an indictment charging that he aided and abetted one George Haynes in the unlawful sale of marijuana. He appeals from the judgment entered upon the jury verdict and the sentence of ten years to ten years and one day in the penitentiary.

Error is charged in the refusal of defendant's pre-trial motion *in limine,* in various rulings on evidentiary matters during the trial, and in the refusal of bail pending appeal. It is also argued that the evidence does not show the defendant guilty beyond a reasonable doubt.

The evidence introduced by the prosecution was that defendant was present in Haynes' apartment on December 17th, 1968, the date of the alleged offense, when inspectors for the Illinois Bureau of Narcotics came there with marked money to make a purchase of marijuana from Haynes; and that there were negotiations between the agents and Haynes in defendant's presence, characterized as "haggling" over the price. The agents testified that

Haynes stated he and the defendant would pick up the marijuana for the witnesses to see and that they then left in Van Riper's car, returning a short time later with the drug. Defendant is alleged to have said that he would buy it if one of the agents did not, even if he had to go out and get the money, and that it was good material. Defendant smoked a marijuana cigarette in the agents' presence in connection with this alleged conversation.

Defendant was not shown to be in possession of the marijuana and he was not seen by the agents to receive any of the money paid to Haynes in the purchase.

Van Riper testified that he was not present in the apartment on December 17th. This was corroborated by his sister and brother and two employees of a shopping center where he claimed to be during the time in question.

The jury was justified in returning its verdict on the conflicting evidence. The credibility of the testimony of the State's witnesses was chosen over that of the alibi witnesses. The agent who made the purchase testified that he relied upon the advice of defendant that the marijuana was of good quality and worth the price to be paid before he mad the purchase. This testimony on its face might appear somewhat incredulous. However, the agent explained that his purpose was to protect his "cover" as a drug purchaser and that he would not otherwise have purchased in this occasion without defendant's assurance. This explanation of the conversation was for the jury to evaluate, together with the evidence that defendant drove Haynes in defendant's car when Haynes left and subsequently returned with the supply. On review it must be said that the State's evidence was sufficient beyond a reasonable doubt to support the finding of guilt of aiding and abetting an unlawful sale of marijuana.

Defendant has placed his major emphasis on claims of trial error which he argues deprived him of a fair trial.

He first suggests that the court erred in refusing to grant his motion *in limine* made prior to trial. In the motion defendant sought to exclude evidence tending to show defendant used or possessed narcotic drugs. He also sought to exclude evidence bearing on his manner of appearance or dress at the time in question. While notifying the State of his alibi defense, he sought to make a distinction between the issue of defendant's whereabouts at the time of the crime and the question of the identification of the defendant. He offered to concede that the agent's testimony would identify defendant as the person referred to as being present in the apartment who purportedly aided in the sale by Haynes, but maintained that he was not there. The motion further sought to exclude evidence of actions by defendant on occasions prior to December 17th.

The court denied the motion in its entirety. In so doing, we believe that the court acted within its discretion in deciding that it would rule on the matters raised as they came up in the trial. Defendant cites the civil case of *Bruske* v. *Arnold,* 100 Ill. App. 2d 428, 432 (1968), together with textbook authorities approving such pre-trial motions in criminal cases. (Stanton Illinois Criminal Law and Practice, Volume 1 at pages 402 and 438; I.L.P. Criminal Law, Sections 265 and 267) While we do not preclude circumstances under which such motions may be properly granted, or improperly denied, in a criminal case, the ruling on the very broad request here was well within the court's discretion.

We next consider the court's trial rulings upon the evidence sought to be excluded in the motion. The evidence questioned included the testimony by a State's witness that the defendant had smoked a marijuana cigarette in his

presence to aid in the sale by Haynes and the testimony of the witness that defendant had been present but not participating on two or three previous occasions in Haynes' apartment when narcotics were sold.

The State argues that the smoking of the marijuana cigarette by defendant was admissible as part of the *res gestae* of the crime. We do not accept this term or concept as applicable to the situation here, but we do agree that the evidence was properly admitted.

There was considerable discussion relating to the quality of the marijuana and its worth, preceding the consummation of the sale. The testimony that defendant smoked a cigarette made from the material, boosted its quality and offered to purchase it himself, establish circumstances which properly went to the trier of the facts to determine whether defendant did aid and abet the sale. This evidence was independently relevant to prove the circumstances of the crime charged and it was unnecessary to limit the scope of the testimony to proof of a mental state by an instruction to the jury, as defendant argues. Although the act of defendant in smoking a marijuana cigarette was evidence of the crime of possession of narcotics — a crime with which he was not charged — it was so blended or connected with the charge on trial that proof of the one incidentally involved the other. See, for example, *United States* v. *Hoskins,* 406 Fed. 2d 72, 75 (1969); *The People* v. *Hall,* 38 Ill. 2d 308, 315 (1967).

The evidence that defendant was in Haynes' apartment on previous occasions when narcotics were sold, stands upon a different footing. This evidence was ostensibly offered to prove defendant's knowledge of illicit sales in the Haynes' apartment, tending to refute the defendant's theory that he was, at best, an innocent bystander (if the jury disregarded his alibi evidence that he was not present

at the sale on December 17th). It was not, in fact, proof of any crime committed by defendant on an unrelated occasion. The evidence of the earlier presence when narcotics were sold in and about Haynes' apartment was properly admissible to negative the possibility of innocent or inadvertent conduct by the defendant on the date of the offense charged. *The People* v. *Aldridge*, 19 Ill. 2d 176, 180 (1960). The jury was specifically instructed that defendant was not accused of violating the drug act on any occasion other than the one in question, and that such evidence was admitted for the limited purpose of attempting to show the knowledge or intent of the defendant on the occasion in question and for no other purpose. Both the prosecutor and the defense counsel expressed these limits to the jury in closing argument. While it would have been better practice for the court to have instructed the jury as to the limited scope of this evidence coincidentally with its introduction, the failure to do so was not reversible error under the circumstances.

Defendant had also complained of the admission of a photograph of defendant as he appeared at the time of arrest, with police identification removed, and which depicted him as having what has been characterized as a "hippie-type" hair-do. The photograph had probative value and was properly admitted in connection with the testimony of the State's witnesses identifying the defendant in Haynes' apartment at the time in question, in view of the alibi which placed defendant's identification in issue, and considering the additional fact that defendant appeared clean-shaven at the trial. *The People* v. *Maffioli*, 406 Ill. 315, 322 (1950).

The remaining argument of defendant that the trial court erred in refusing to admit him to bail pending appeal, presents no ground for reversing in this proceed-

ing. Supreme Court Rule 609 provided the defendant's sole remedy.

We acknowledge the concern expressed by defendant's counsel, that for the acts proven, defendant has received a severe penalty of the ten year minimum sentence. This court cannot, however, override the legislative judgment expressed in the applicable statute. See *The People* v. *Gonzales,* 25 Ill. 2d 235, 240 (1962).

We, therefore, affirm the judgment below.

AFFIRMED.

ABRAHAMSON, J. and MORAN, J. concur.

## APPENDIX B

Be It Remembered, that afterwards, to-wit: On September 21, 1970 The Supplemental Opinion of the Court on Denial of Petition for Rehearing was filed in the Clerk's Office of said Court, in the words and figures following, viz:

### SUPPLEMENT TO OPINION UPON DENIAL OF PETITION FOR REHEARING

Substitute counsel has filed a Petition for Rehearing alleging additional grounds for reversal not previously raised or argued. He now urges that there was insufficient evidence to prove that the substance in question was marijuana in accordance with the statutory definition; that the trial court erred in not submitting an instruction defining marijuana in accordance with the statutory requirements; and that the statute classifying marijuana as a narcotic is arbitrary and infects the severe penalty for sale of marijuana with unconstitutionality.

Charles R. Turcotte, the crime laboratory analyst for the Bureau of Criminal Investigation in Joliet, testified for the State. The purpose of his testimony was to determine "whether or not there was any material known as Cannabis or Marijuana in the plant material. He first made a microscopic examination, looking for hairs "referred to in the trade as bear claws" on the leaf material. He also performed a Duquenois chemical test from extracted resins. His opinion was that both plastic bags contained "Cannabis Sativa, or Marijuana". He was then asked to "break down" the product, and answered, "It consists of seed material, leaf material, and some stalk material". He was then asked whether he was able to ascertain whether the seeds were capable of germination and answered, "I did not". There was no cross-examination.

In our opinion the testimony was sufficient to prove that the substance contained a narcotic drug in the form of the leaf material within the statute and not falling within the statutory exceptions.

Defendant's reliance upon *The People* v. *Lott,* 24 Ill. 2d 188 (1962) is misplaced. In *Lott,* the testimony on cross-examination was that the substance was composed of "mature" portions of the Cannabis plant and no reference is made to the presence of resin in the particular cigarettes he examined. The defendant thereby brought himself within the statutory exceptions.

We also consider the question raised as to the instructions, although not previously abstracted or argued. The record discloses no instruction defining marijuana. The following instruction (as well as one relating to aiding and abetting in similar terms) was given without objection.

> "A person commits the crime of violating the narcotic drug act who sells marijuana."

Defendant argues that possession of marijuana is not a criminal offense unless it is of the specific quality and kind defined by the statute, citing *The People* v. *Sowrd,* 370 Ill. 140, 143 (1938). The *Sowrd* case does not apply to this prosecution brought under a different statute. Under the present statute all Cannabis is subject to the act, excluding the specific exceptions. The proof was clearly sufficient to sustain the guilty finding and defendant did not bring himself within the exceptions set forth in the statute. See Ill. Rev. Stat. 1967, Ch. 38, Sec. 22-44; *The People* v. *Yeargain,* 3 Ill. 2d 25, 28 (1954); and *People* v. *Frank Washington,* 81 Ill. App. 2d 90, 102 (1966).

*People* v. *Lewis,* 112 Ill. App. 2d 1 (1969) is relied upon by defendant for the proposition that the failure to give a specific instruction defining Marijuana or Cannabis, on

the court's own motion, was reversible error. Since no issue was properly raised disputing the nature of the drugs involved, we are of the opinion that no further instruction was required. In any event, in view of the clear and convincing evidence of defendant's guilt, and the absence of any evidence tending to bring the defendant within the statutory exceptions, reversal is not justified. *The People* v. *Truelook,* 35 Ill. 2d 189, 192 (1966); and *People* v. *Ciconte,* 102 Ill. App. 2d 1, 14 (1968).

The argument that classification of marijuana as a narcotic drug with the severe penalty attached to its sale makes for unconstitutionality is not open for our consideration. We again refer to *The People* v. *Gonzales,* 25 Ill. 2d 235, 240, supra.

Counsel has also raised a question in the Petition for Rehearing, which had been previously raised and argued. This relates to the testimony of defendant's presence in Haynes' apartment on other occasions when narcotics were allegedly sold by Haynes. The quotation of a pertinent portion of our opinion in the Petition for Rehearing is erroneous. Our opinion does not refer to this evidence as tending to prove defendant's guilt of the crime charged against him by proof of *defendant's commission* of other crimes. We held that this proof was admissible as tending to show defendant's *knowledge of the commission* of illicit sales by Haynes on previous occasions when no criminal activity of defendant was suggested, to meet defendant's theory that he was an innocent bystander at the time of this crime charged against him. We adhere to our opinion on this point.

The Petition for Rehearing is therefore denied and we hold to our opinion as filed.

ABRAHAMSON, J. and MORAN, J. concur.